



- (2) What was claimant's average weekly wage on the date of accident?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed.

Claimant contends she has an average weekly wage based upon an hourly rate of \$8.39 per hour. However, claimant testified she was not exactly sure what her average weekly wage was on the date of accident. The wage record placed into evidence by respondent at regular hearing showed claimant's hourly rate to be \$7.99 per hour. Claimant's attorney acknowledged at oral argument that claimant might have been confusing her wage at the time of accident with her wage at the time of her termination from employment with respondent in June of 1999. The Appeals Board finds the wage statement from respondent is the most credible evidence in this matter and claimant's average weekly wage, based upon an hourly rate of \$7.99 per hour and \$.89 per week overtime, is \$320.49.

With regard to claimant's functional impairment, two opinions are in the record. Robert L. Eyster, M.D., board certified orthopedic surgeon, was claimant's treating physician. He treated claimant from March of 1999 through May 11, 2000. Based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Eyster opined that claimant had no permanent impairment as a result of the injuries suffered on February 25, 1999. Additionally, he felt claimant needed no permanent restrictions at the time he released her. Dr. Eyster did, however, agree that, if a diagnostic label were placed upon claimant's condition, it would fit within the parameters of myofascitis.

Daniel D. Zimmerman, M.D., examined claimant at her attorney's request on September 12, 2000. Dr. Zimmerman diagnosed arthritic changes at L-1, L-2, chronic cervical paraspinous myofascitis, and chronic lumbar paraspinous myofascitis. He rated claimant at 15 percent to the body as a whole pursuant to the AMA Guides, Fourth Edition.

Dr. Zimmerman's rating, however, takes into consideration osteoarthritic changes at L1, L-2, which Dr. Zimmerman acknowledged he could not, within a reasonable degree of medical certainty, attribute to her injuries of February 25, 1999. Additionally, Dr. Zimmerman's rating included both the right and left lower extremities. However, claimant, at no time, complained of left side pain or any left side complications from this injury. Therefore, Dr. Zimmerman's rating involves areas of the body that were not injured in the February 25, 1999, accident.

In workers' compensation litigation, the burden of proof is on claimant to establish her right to an award of compensation by proving the various conditions upon which that right depends by a preponderance of the credible evidence. See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

It is the function of the trier of fact to determine which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Here, the Appeals Board finds neither the opinion of Dr. Eyster nor the opinion of Dr. Zimmerman accurately reflects claimant's functional disability. Dr. Eyster found claimant to have no permanent impairment, even though claimant continued exhibiting symptoms. Dr. Zimmerman, on the other hand, in reaching his opinion regarding functional impairment, acknowledged that he included conditions which were not related to the February 25, 1999, accident. The Appeals Board finds the claimant's true impairment falls somewhere in between. The Administrative Law Judge awarded claimant a 5 percent impairment to the body as a whole. The Appeals Board agrees with that conclusion and affirms same.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish, dated April 6, 2001, should be, and is hereby, affirmed.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant  
R. Todd King, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director